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October 8, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 13, 2008

Case Number: TSO-0640

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual's suspended access authorization should be restored.

I. BACKGROUND

In an August 2006 Questionnaire for National Security Positions, the individual indicated that he used marijuana while holding a security clearance. In January 2008, the DOE conducted a Personnel Security Interview with the individual (the 2008 PSI) regarding his past use of marijuana. Following this PSI, the individual's access authorization was suspended.

In May 2008, the Manager for Personnel Security of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. Enclosure 2 to this letter, which is entitled "Information Creating a Substantial Doubt Regarding Eligibility for Access Authorization," states that the individual's behavior has raised security concerns under Sections 710.8(k) and (l) of the regulations governing eligibility for access to classified material (Criteria K and L). With respect to Criterion K, the DOE area office finds that information in the its possession indicates that the individual used marijuana five to six times in 1969 or 1970, and that he last used marijuana "one time in April 2003." Enclosure 2 at 1.

The DOE area office finds with respect to Criterion L that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy. Specifically:

A. On January 8, 2001, he signed a DOE Security Acknowledgment which stated that he understood that he was not to have any involvement with illegal drugs and that doing so could result in the loss of his security clearance. However, in 2003, while holding a security clearance, he tested positive for marijuana in a random drug test. Despite testing positive for marijuana, the National Nuclear Security Administration was never notified of the failed drug test in 2003.

B. He admitted that he violated his DOE Security Acknowledgment by using marijuana while holding a clearance.

See Enclosure 2 to Notification Letter, DOE Exhibit 1.

The individual requested a hearing (hereinafter "the hearing") to respond to the concerns raised in the Notification Letter. In his initial written response to those concerns, the individual admitted that he used marijuana "experimentally" during high school in the late 1960's. He also admitted using marijuana in 2003 after the death of his son in an automobile accident. At that time, he was still grieving the death of his father nine months earlier, and the death of his son left him in a "state of shock." He stated that after a failed drug test in August 2003, he entered a company-prescribed rehabilitation program, where he learned a lot about the grieving process, and renewed the decision he had made in high school to reject marijuana. Finally, he stated that he wrongly assumed that DOE security would automatically be notified about his failed drug test, because the test was administered by his employer, a DOE contractor.

The hearing in this matter was convened in September 2008. At the hearing, the testimony focused on the individual's efforts to corroborate that his only post-1970 use of marijuana occurred following the death of his son in June 2003 and prior to his failed drug test in August 2003. Testimony also was received concerning whether it was reasonable for him to assume that DOE security had received notice of the August 2003 failed drug test, and concerning his commitment to abstain from marijuana use.

II. HEARING TESTIMONY

At the hearing, testimony was received from five persons. The individual, who was represented by counsel, testified and presented the testimony of wife, his family pastor, a co-worker and longtime friend, and his supervisor.

A. The Individual

The individual stated that he experimented with marijuana in the late 1960's while in high school and college, but rejected the drug because he believed that it makes you lazy and unambitious. He stated that he did not use marijuana again until after his son died in late June 2003, and that he has not used any since July 2003. TR at 51-53.

The individual testified that his teenage son died unexpectedly in late June 2003, when he was struck by a car. 1/ The individual stated that he was crushed by his son's death and cried for three days, and that his wife was in even worse shape. He testified that he obtained a prescription for Xanax in early July 2003 to help him get through the funeral service and his son's burial in another state. TR at 55-57.

The individual stated that after he returned home from his son's burial around July 14, 2003, he began to make inquiries about who was with his son on the night of his fatal accident. He stated that he learned that two individuals who he did not know were seen with his son on the night of the accident. He also learned that another friend of his son who lived out-of-state and was visiting home might have information about these two individuals. TR at 58-60.

The individual testified that he went to an outdoor gathering of young people near the town to search for these three individuals, and to get more information about what had happened to his son. He stated that he went to this gathering by himself, and that he was recognized as the father of his deceased son by his son's friend and by other young people at the gathering. He testified that as he spoke to different groups of young people at this gathering, they would express condolences and offer him beer and "hits" of marijuana. He stated that he drank and smoked the marijuana to fit in, because he wanted information. He testified that he took

1/ The individual submitted his son's death certificate, which confirms the time and manner of his teenage son's death.

several "hits" on these marijuana joints during the one to one-and-a-half hours that he was present at this gathering. He stated that he left the gathering without gaining any information about locating the individuals who reportedly were with his son on the night of his death. TR at 61-63. The individual testified that he is not certain of the date on which he attended this gathering, but his best estimate is that it took place in the last two weeks of July 2003. TR at 92. He stated that this gathering was the only instance since college when he used marijuana, but that night he took multiple "hits" from at least two marijuana cigarettes. TR at 105-107, 119.

The individual stated that in early August 2003, he returned to work from a period of bereavement leave following his son's death. He recalled that on the day he returned to work, he was given a drug test 2/ and, a few days later, he was summoned to the site office, where an administrator informed him that he had failed the drug test and confiscated his DOE badge. TR at 64-67. The individual stated that since this administrator was the person to whom he reported security-related incidents, he assumed that DOE Security was aware of the failed drug test. He stated that he now knows that this administrator is a contract employee, and that he should have submitted an incident report to the DOE concerning the failed drug test. TR at 66-67.

The individual testified that he accepted the drug rehabilitation option offered by his employer, and immediately entered an outpatient program. He stated that this program involved one-on-one counseling, where he learned about the problems of illegal drug use, as well as group sessions. He testified that he shared experiences with other group members who had lost children, and that this helped him to deal with his grief. He stated that he also has received grief counseling from several local pastors. TR at 71.

The individual stated that after he successfully completed the rehabilitation program, 3/ his badge was returned to him by his

2/ The individual was tested on August 14, 2003. Positive results for marijuana metabolite were recorded on August 17, 2003. See "Drug Testing Custody Control Form", DOE Exhibit 25.

3/ The individual submitted a letter indicating that on September 12, 2003, he completed an "Intensive Outpatient Program" consisting of fifteen hours of education and group interaction focused on the
(continued...)

employer, and he returned to work. He testified that he thought that the situation had been concluded. TR at 73. The individual stated that he later reported his 2003 use of marijuana on a 2006 DOE QNSP, in 2007 to an Office of Personnel Management investigator, and that he discussed it at his 2008 PSI. He testified that on the 2006 QNSP, he reported that he used marijuana after his son was killed, but erroneously reported that this happened in 2001, because he is "poor with dates." He stated that at the 2008 PSI, he halted the interview to telephone his wife, so that he could report the correct year to the DOE. TR at 74-81.

The individual stated that he regrets his use of marijuana, and believes that illegal drugs are a social scourge that has harmed his children. He stated that he now would leave any social function where illegal drugs appear. He believes that he would not use marijuana if he were to undergo another tragedy like his son's death, because he has learned more about coping with grief. TR at 82-83. He stated that he regularly attends a church. Since 1999, he has been on the board of a church committee that requires him to travel to church youth groups throughout his state, although he stated that he did not participate in this activity for a year after his son was killed. TR at 43-44.

B. The Individual's Wife

The individual's wife testified that she and the individual met in 1969 in high school, had no contact from 1972 until 1982, and then got back together and married. They had two children, a son who died in 2003 and a daughter who is now in college. TR at 124. She stated that she and the individual occasionally used marijuana together in high school. She stated that since they got back together in 1982, neither of them has used illegal drugs, with the exception of the individual's July 2003 usage of marijuana. TR at 125-128.

The individual's wife testified that when their son was killed in late June 2003, she and the individual both took it very hard, and were shocked and devastated. TR at 130. She stated that their son was buried in another state, and that she and the individual returned home from his trip on July 12 or 13, 2003. TR at 131, 134. She stated that she was not present at the youth gathering

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effects and consequences of drug use. He also submitted a letter and form indicating that he was drug tested and returned to duty on September 23, 2003.

where her husband used marijuana, and stated that she could not recall whether her husband told her that he was going to this gathering, or when the gathering took place. TR at 134-135. She stated that he did not tell her that he had smoked marijuana on that occasion until he was sent home from work in August 2003 after he failed the drug test. She testified that he was off of work for a month or six weeks while he completed the rehabilitation program. TR at 137-139. She stated that, aside from high school use, she has never witnessed her husband using marijuana, or suspected that he was using marijuana. TR at 147-148.

She stated that the individual has discussed illegal drug use with her, and that they both believe that it is a scourge on society. TR at 135. Other than the high school use, she testified that she has never suspected her husband to have used illegal drugs, either before or after the 2003 incident, and that she would not tolerate such use. TR at 139. She confirmed that the individual attended counseling as part of his employer directed drug rehabilitation. She stated that she believed that it helped him to cope with the grief and stress of his son's death. TR at 144.

C. The Family Pastor

The family pastor testified that from July 2002 until June 2008, she served an appointment as a pastor at the church attended by the individual and his wife. She stated that she and the individual became friends, and that they worked together in a church youth program. TR at 151-152. She stated that after his son was killed, the individual was angry and upset. TR at 156-157.

She stated that she made pastoral visits to the individual's wife and mother-in-law in the individual's home about twenty to thirty times between 2002 and 2008, and that she never saw or suspected that the individual or his wife used illegal drugs. TR at 157-159. She stated that the individual is an honest and faithful person, and has now developed coping skills that he did not have in 2003 when his son was killed. TR at 161-163. She did not believe that the individual would be intentionally deceptive about the dates of events or the circumstances of his marijuana use. She stated that she assumed that he smoked marijuana in July 2003 to try to get rid of the pain of his son's death. TR at 164. She stated that subsequent to 2003, the individual and his wife asked for her counseling assistance when they caught their daughter with marijuana. She recalls that at that time, the individual berated himself for having set a bad example for his daughter by smoking marijuana in 2003. TR at 159-160.

D. The Individual's Co-worker and Long Time Friend

The individual's co-worker and long time friend testified that he and the individual attended a trade school together in the 1970's, and have known each other and worked together since then. He stated that he sees the individual two or three times a week at the DOE work site, and that they stop and talk. He testified that he lives four miles from the individual, and that their families socialize together. TR at 166-168. He stated that throughout the years, he has not observed or suspected that the individual was using illegal drugs. TR at 169-170. He stated that after the 2003 death of the individual's son, he was concerned about the individual because he did not seem like himself, and appeared traumatized. TR at 170. He stated that after the individual failed the company drug test in August 2003, the individual admitted to him that he had used marijuana, and said that he did not know why he did it. TR at 174. The co-worker and friend testified that the only reason he could think of that the individual would use marijuana, would be "trying to deal with the pain from losing a kid." TR at 174.

The co-worker and friend testified that the individual is an honest and fair person, and believes that he is remorseful about his 2003 use of marijuana. He does not believe that the individual is likely to use marijuana in the future. TR at 173-174.

E. The Individual's Supervisor

The individual's supervisor testified that he has worked at the DOE site since 1983. He stated that he has known and supervised the individual since 1998. However, the supervisor testified that he was reassigned for nine months in 2003, and was not the individual's supervisor at the time of the failed drug test. The supervisor stated that he sees the individual on a daily basis at the workplace, and that the individual has never appeared intoxicated or under the effect of marijuana. He testified that the individual is very professional, conscientious, and reliable concerning his work, and has never given reason for doubts about his honesty or trustworthiness. He stated that he has no social contact with the individual. TR at 24,

The individual's supervisor testified that since about 1993, contractor employees such as the individual have been subject to random drug testing. TR at 37. He could not specifically recall if the individual was randomly tested prior to 2003 [TR at 39], but since 2003 he has summoned the individual for random drug testing on more than five occasions. TR at 26-27. The supervisor stated

that he would have been informed of the suspension of the individual's clearance if the individual had failed one of these tests. TR at 27. The supervisor noted that from 2006 until very recently, the individual was enrolled in the Human Reliability Program (HRP). He therefore was subject to two drug testing programs in the workplace - the random drug tests given to all DOE site personnel, and the random drug tests required to maintain his certification in the HRP. TR at 26-27. He stated that the drug test administrators notify company personnel that they have two hours to report for their random test. TR at 26. The individual's supervisor stated the individual told him that his use of marijuana in 2003 was a stupid mistake, and that he does not condone such use. TR at 34.

The individual's supervisor stated that he did not know that the individual had a responsibility to report his failed 2003 drug test to the DOE. The supervisor stated that it was his personal understanding that the results of positive drug tests went right up the chain of command. TR at 31.

III. APPLICABLE STANDARDS

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a presumption against granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security test" for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing (Case No. VSO-0005)*, 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. ANALYSIS

A. Criterion K

There is no question that this individual used marijuana in 2003, and that this behavior raises a Criterion K security concern. However, as discussed below, I find that the individual has resolved the concern.

As an initial matter, I am convinced that the individual's marijuana use was minimal, and that it occurred when the individual's judgment was compromised by emotional bereavement at the death of his teenage son in an automobile accident. The individual consistently has maintained that his use of marijuana was confined to taking "hits" from marijuana cigarettes that were offered to him at a gathering of young people that he attended during the month after his son's death. I find that this explanation of his use of marijuana is plausible in light of the individual's bereavement. His failure to provide witness corroboration of this gathering is understandable given the passage of five years since the event, and because the attendees at the gathering were not his social acquaintances.

The individual and his witnesses testified convincingly that marijuana use has not been a part of the individual's adult lifestyle. The individual, who is now in his fifties, admitted to using marijuana prior to 1970, and this was confirmed by his wife, who knew the individual in high school. However, the individual and his wife persuasively testified that they have not used marijuana together as adults, and that they have been committed to setting a good example to their children. The individual's longtime friend co-worker testified that he socializes with the individual and his wife, and that he has never suspected them of using illegal drugs. The individual's family pastor, who was a frequent visitor at the individual's home, and who was involved in a longstanding youth outreach program with the individual, testified that she never observed or suspected the individual or his wife of using marijuana or other illegal drugs.

The individual's commitment to a drug-free lifestyle also is supported by the testimony of his supervisor, who stated that the

individual has been subject to random drug testing since 1993. This testing supports the individual's assertion that his 2003 use of marijuana was an aberration.

I am convinced that the individual has not used marijuana since his failed drug test in August 2003. Again, his testimony and that of his witnesses was fully persuasive, as is his record of more than five random drug screens that have shown no indication of drug use. More than five years have passed since the individual's marijuana use, and this is a sufficient period of time to allow me to conclude that the 2003 usage was an isolated, aberrant episode in his life that is now well behind him.

Moreover, I believe that the lapse of judgment that the individual experienced in 2003 is not likely to recur. The individual has documented that his son died when he was struck by an automobile in late June 2003, and the witness testimony persuasively establishes that the individual suffered a period of shock and grief that lasted for several weeks. While this emotional bereavement in no way excuses the individual's use of marijuana at a social event attended by friends of his deceased son, it does establish that extraordinary circumstances were present that affected the individual's usual judgment and trustworthiness.

At the hearing and in his May 2008 response to the Notification Letter, the individual asserted that the counseling and group therapy that he received following his failed August 2003 drug test helped him in coping with his grief, and in restoring his conviction that illegal drugs will not be a part of his life. This assertion was supported by the testimony of his wife and his family pastor. Further, the individual recognizes that he used bad judgment in consuming marijuana, and takes full responsibility for these actions.

I believe that the individual's judgment is now sound. I also am persuaded that through counseling he has gained heightened self awareness and is unlikely to suffer from this type of lapse of judgment in the future. The individual's record of five years of random workplace drug testing without incident is an additional factor in his favor. In view of the foregoing, I find that the individual has fully resolved the Criterion K security concern in this case. 4/ See Personnel Security Hearing (Case No. TSO-0103),

4/ My analysis and finding concerning mitigation are in accord with the standards for mitigating security concerns relating to
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29 DOE ¶ 82,765, at 85,590 (1995), *affd.*, *DOE Headquarters Appeal Panel* (August 5, 2005) (minimal use of marijuana by individual holding an access authorization mitigated by admission of wrongdoing, counseling, and three years of abstinence).

B. *Criterion L*

The Notification Letter finds that the following behavior by the individual raises a Criterion L concern: (i) he used marijuana in 2003 while holding a security clearance, even though in 2001 he had signed a DOE Security Acknowledgment which stated that he understood that he was not to have any involvement with illegal drugs and that doing so could result in the loss of his security clearance; and (ii) despite testing positive for marijuana in 2003, he did not notify DOE Security of his positive drug test in 2003.

Overall, I do not find that the individual has engaged in unreliable or untrustworthy behavior, apart from the bad judgment involved in using the marijuana on one occasion following his son's death in 2003. I find that the individual's 2003 marijuana use was a temporary lapse in judgment caused by his emotional bereavement, and does not reflect a general disregard for Criterion L security concerns relating to the use of illegal drugs. I find that this instance of bad judgment is not likely to recur. As discussed above, this lapse is now well in the past and the individual has had some education and counseling on how to cope with stressful times, when the exercise of good judgment could become an important issue.

Although it is true that the individual might have been subject to pressure or coercion during the period prior to the time that he informed the DOE about his illegal drug use, this concern, too, is now well in the past. I find that the individual's failure to report his drug use and his failed drug test to DOE Security in a timely manner was an unintentional oversight that will not be repeated. I accept the individual's testimony that, in 2003, he believed that his employer informed DOE Security of any positive results from its random drug tests, a position that is supported by

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past drug use that are set forth in Guideline H to the revised "Adjudicative Guidelines Approved by the President in Accordance With the Provisions of Executive Order 12968". See Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, <http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf> (December 29, 2005).

the testimony of the individual's supervisor. My finding that this omission was unintentional also is supported by the fact that the individual reported his failed 2003 drug test on his 2006 QNSP.

For these reasons and those discussed above with respect to Criterion K, I find that the Criterion L concerns have been resolved. See *Guideline E, Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* at 8-9; *Personnel Security Hearing (Case No. TSO-0103)*, 29 DOE at 85,588.

V. CONCLUSION

After considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I find that the evidence and arguments advanced by the individual convince me that he has mitigated the DOE's Criteria K and L security concerns. Accordingly, I find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. 10 C.F.R. §§ 710.7(a), 710.27(a). It therefore is my conclusion that the individual's access authorization should be restored. The individual may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: October 8, 2008